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Lau Siang Kok, Lionel v Lau Cho Kun @ Lau Yu Chak, Datuk Seri Panglima

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-24–1561 OF 2009
LEE HENG CHEONG JC
30 JULY 2013

Succession — Probate and administration — Wills — Order to bring in will — Demand for executors to produce last will and testament of deceased — Whether plaintiff was 'person interested' under s 41 of the Probate and Administration Act 1959 — Plaintiff not a beneficiary under the will — Failure to prove that plaintiff was natural son of deceased — Whether there was application for grant of probate made by plaintiff — Whether application refused — Probate and Administration Act 1959 s 41

Words and Phrase — Meaning of 'any person interested' — s 41 of the Probate and Administration Act 1959

The plaintiff claimed that he was the natural son of one Tan Sri Datuk Lau Gek Poh ('the deceased') and made several futile requests to the defendant, as the executor of the estate of the deceased, to produce the last will and testament of the deceased ('the will'). Hence, the plaintiff commenced this originating summons against the defendant pursuant to s 41 of the Probate and Administration Act 1959 ('the Act') for an order that the defendant produce to the plaintiff a copy of the will. The defendant opposed the plaintiff's application, inter alia, on the grounds that the plaintiff: (i) was not a beneficiary under the will and was thus not entitled to the orders sought; (ii) had had sight of the will and was aware that he was not a beneficiary under the said will; (iii) had not made any application for grant of probate entitling him to the relief sought pursuant under s 41 of the Act; (iv) had conceded that he was not a named beneficiary in the will; (v) had not provided any cogent evidence that he was the natural son of the deceased; and (iv) did not fall under the definition of 'any persons interested' under the provisions of s 41 of the Act.

Held, dismissing the application with costs:

(1) The phrase 'any person interested' appearing in s 41 of the Act, is not to be interpreted to mean 'the world at large'. It should be restricted to an individual or group of individuals who have a 'recognised' interest in the estate of the deceased. The Act clearly refers to a beneficiary, a residual legatee, a creditor or a trustee and the plaintiff did not fall into any of

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those categories. The plaintiff was a stranger for all intents and the purposes of the estate of the deceased as he was not a beneficiary under the will (see para 14).

(2) Since the plaintiff was not an 'interested' person as he was not named or provided for in the will, the plaintiff did not possess the necessary locus standi to make the application for the production of the will under s 41 of the Act. Being an alleged natural or illegitimate son of the deceased, did not mean that the plaintiff fell within the meaning of the 'any person interested' as contemplated by s 41 of the Act (see para 15).

(3) No application for grant of probate had been made in Malaysia and as such the plaintiff was not entitled to any of the reliefs sought under s 41 of the Act. Section 41 of the Act is inoperative until and unless an application for grant of probate has been made, hence the application was premature (see para 16).

(4) The plaintiff had not proven that he was the 'legitimate' child of the deceased, so as to entitle him to any assets under the Distribution Act 1958. The plaintiff had also failed to prove that there was a valid marriage between the deceased and the plaintiff's mother. Hence, the plaintiff's application for the production of the will was an exercise in futility (see paras 25–26).

[Bahasa Malaysia summary

Plaintif mendakwa bahawa dia adalah anak lelaki sah kepada seorang yang bernama Tan Sri Datuk Lau Gek Poh ('si mati') dan membuat beberapa permohonan sia-sia kepada defendan, sebagai pentadbir estet si mati, untuk mengemukakan wasiat terakhir si mati ('wasiat'). Maka plaintif memulakan saman pemula ini terhadap defendan berikutan s 41 Akta Probet dan Pentadbiran 1959 ('Akta') untuk perintah bahawa defendan mengemukakan kepada plaintif salinan wasiat tersebut. Defendan menentang permohonan plaintif, antara lain, atas alasan bahawa plaintif: (i) bukan benefisiari di bawah wasiat dan oleh itu tidak berhak kepada perintah-perintah yang dipohon; (ii) melihat wasiat dan sedar yang dia bukan benefisiari di bawah wasiat tersebut; (iii) tidak membuat apa-apa permohonan untuk pemberian probet memberikan dia hak kepada relief yang dipohon berikutan di bawah s 41 Akta; (iv) telah mengaku yang dia bukan benefisiari yang dinamakan dalam wasiat tersebut; (v) tidak mengemukakan apa-apa keterangan yang menyakinkan bahawa di adalah anak lelaki sah si mati; dan (iv) tidak terangkum di bawah definisi 'any persons interested' di bawah peruntukan s 41 Akta.

Diputuskan, menolak permohonan dengan kos:

(1) Frasa 'any person interested' terdapat dalam s 41 Akta, tidak boleh ditafsirkan untuk bermaksud 'the world at large'. Ia patut dihadkan kepada individu atau kumpulan individu yang telah 'recognised'

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kepentingan di dalam estet si mati. Akta jelas merujuk kepada benefisiari, penerima pusaka, pemiutang atau pemegang amanah dan plaintif tidak terangkum dalam mana-mana kategori tersebut. Plaintif adalah orang asing untuk kesemua niat dan tujuan estet si mati kerana dia bukan benefisiari di bawah wasiat tersebut (lihat perenggan 14).

(2) Memandangkan plaintif bukan orang 'interested' kerana dia tidak dinamakan atau diberikan di dalam wasiat, plaintif tidak mempunyai locus standi yang perlu untuk membuat permohonan itu untuk pengemukakaan wasiat di bawah s 41 Akta. Sebagai anak sah atau anak tak sah si mati, tidak bermaksud bahawa plaintif terangkum dalam maksud 'any person interested' seperti yang ditetapkan oleh s 41 Akta (lihat perenggan 15).

(3) Tiada permohonan untuk pemberian probet telah dibuat di Malaysia dan dengan itu plaintif tidak berhak kepada apa-apa relief yang dipohon di bawah s 41 Akta. Seksyen 41 Akta tidak beroperasi sehingga dan kecuali permohonan untuk pemberian probet dibuat, maka permohonan itu adalah pramatang (lihat perenggan 16).

(4) Plaintif tidak membuktikan bahawa dia adalah anak 'legitimate' si mati, oleh itu untuk memberikan dia hak kepada mana-mana aset di bawah Akta Pembahagian 1958. Plaintif juga gagal untuk membuktikan bahawa terdapat perkahwinan sah antara si mati dan ibu plaintif. Maka, permohonan plaintif untuk pengemukaan wasiat adalah permohonan yang sia-sia (lihat perenggan 25–26).]

Cases referred to

Beesley,Re, ex p Beesley v Official Receiver [1975] 1 WLR 568, Ch D (refd)
Chia Kay Heng & Anor v Chia Kim Siah & Anor [1990] SLR 117, CA (refd)
Estate of Teo Quee Kee (deceased), Re [1997] 3 SLR 1030, HC (refd)
Hill and another v Crook [1874–80] All ER Rep 62, HL (refd)
Isabela Madeline Roy & Ors v Sarimah Low bte Abdullah & Ors [2005] 2 MLJ 521; [2004] 8 CLJ 302, HC (refd)
Lembaga Lebuhraya Malaysia v Cahaya Baru Development Bhd [2009] 5 MLJ 14, CA (refd)
Milevoi v Muzychyn [1997] SJ No 565 (refd)
Roehampton Swimming Pool Ltd, Re [1968] 1 WLR 1693, Ch D (refd)

Legislation referred to

Distribution Act 1958 s 3
Land Acquisition Act 1960 s 2
Probate and Administration Act 1959 s 41
Probate Court Practice, Procedure and Forms Regulations [CAN]
Probate Act [CAN] s 106

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Goh Siu Lin (Shook Lin & Bok) for the plaintiff.
S Nantha Balan (Idza Hajar Ahmad Idzam with him) (Zul Rafique & Partners) for the defendant.

Lee Heng Cheong JC:

INTRODUCTION

[1] On 31 July 2009, the plaintiff commenced this originating summons against the defendant in the High Court of Malaya at Kuala Lumpur pursuant to s 41 of the Probate and Administration Act 1959 ('the 1959 Act').

[2] The plaintiff, claims that he is the natural son of the deceased and one Mdm Lum Sook Chan. The plaintiff made several requests to the defendant to produce the last will and testament of the deceased (the 'will') and the defendant is sued in his capacity as the executor of the estate of Tan Sri Datuk Lau Gek Poh (the 'deceased').

[3] The plaintiff's said originating summons dated 31 July 2009 herein prayed for, inter alia, the following reliefs:

(a) that the defendant (his servants and/or agents) shall within seven days of the pronouncement of the application for the production of the will, produce to the plaintiff, a copy of the last will and testament of the deceased and the trust settlement and any other related testamentary documents pertaining to the deceased's estate;

(b) that costs of this application be borne by the deceased's estate; and

(c) such further and/or other relief as this honourable court deems just and fit.

[4] The defendant opposes the plaintiff's application on, inter alia, the following grounds:

(a) that the plaintiff is not a beneficiary under the deceased's will and is therefore not entitled to the orders sought in the plaintiff's originating summons;

(b) that the plaintiff had a without prejudice meeting with the defendant wherein the plaintiff has had sight of Tan Sri Datuk Lau Gek Poh's Will and is aware that he is not a beneficiary under the said will;

(c) that no application for grant of probate has been made in Malaysia entitling the plaintiff to the relief sought pursuant to the provisions of s 41 of the Probate and Administration Act 1959;

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(d) that counsel for the plaintiff at the hearing of the defendant's striking out application on 7 June 2010 conceded that (i) the plaintiff is not a named beneficiary in the will and (ii) that the plaintiff wanted a copy of the will for the sole purpose of challenging the validity of the said will;

(e) the plaintiff has not provided any cogent evidence that he is the natural son of Tan Sri Datuk Lau Gek Poh;

(f) that the plaintiff has no locus to institute a claim for an order to compel the defendant as executor of Tan Sri Datuk Lau Gek Poh's Estate to produce Tan Sri Datuk Lau Gek Poh's will and any other testamentary documents that the defendant may have in his possession; and

(g) the plaintiff does not fall under the definition of 'any persons interested' under the provisions of s 41 of the Probate and Administration Act 1959.

CONSIDERATION OF THE APPLICATION

[5] In considering the plaintiff's application herein, it would be pertinent to consider, inter alia, whether the plaintiff falls under the definition of 'any persons interested' under the provisions of s 41 of the Probate and Administration Act 1959 ('the 1959 Act').

[6] Section 41 of the 1959 Act states as follows:

> 41 Order to bring in will, etc.
>
> The Court may, on the application of *any person interested*, if it appears that there is reason to believe that any will or other testamentary document of a deceased person is in the possession or under the control of any person, or that any person has knowledge of the existence of such a will or document, order that the person do, within a time named, produce the will or document at the Registry, or attend at a time named before a Court, for the purpose of being examined in relation to that document. (Emphasis added.)

[7] It is not disputed that the plaintiff is not a beneficiary to the alleged will and the plaintiff did not at any time claimed to have any beneficial interest under the alleged will. The plaintiff had sight of the alleged will at a without prejudice meeting in Hong Kong and is fully aware of the fact that he is not a named beneficiary.

[8] This court is guided by following cases from other commonwealth jurisdictions such Canada and England.

[9] In Canada, the Probate Court Practice, Procedure and Forms Regulations made under s 106 of the Probate Act defines a 'person interested in

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an estate' as follows:

Person interested in an estate

52(1) Subject to subsection (2), a person interested in an estate is, for the purposes of this Part, any

(a) Residuary beneficiary;

(b) Unpaid non-residuary beneficiary;

(c) Person entitled to share in the distribution of the estate on intestacy;

(d) Life tenant;

(e) Trustee, guardian, court-appointed guardian or attorney appointed under the Powers of Attorney Act for a person under a disability;

(f) Trustee, guardian, court-appointed guardian or attorney appointed under the Powers of Attorney Act for a missing person or unascertained person;

(g) The public trustee, where the Public Trustee Act applies;

(h) Unpaid claimant or creditor who has filed a claim in accordance with Section 48;

(i) Unreleased security;

(j) Personal representative.

[10] Based on the above, Canadian law defines 'any person interested' to exclude the world at large and include a limited class of 'persons interested'. In *Milevoi v Muzychyn* [1997] SJ No 565 (QB), the applicants were the only three children of the deceased. The probated will named the respondent as executor and sole beneficiary. The applicants contended that the probated will was not the last will and testament of their father, and swore their father showed them a later will in which all three children were named beneficiaries. The court decided that the children were persons 'interested' in the estate and stated at p 3 para 8 as follows:

8. *It is not necessary to resolve who 'may be' interested in an estate for the purposes of Rule 735, because the applicants are persons 'interested' in the estate. Tristram and Coote's Probate Practice, 23rd ed. (London: Butterworths, 1970), at pp. 622-623 indicates that persons who are entitled under an intestacy, a legatee in the will, and an executor or beneficiary under any other testamentary instrument are interested persons* and are entitled to proof in solemn form either before or after probate has been taken in common form ... These same persons would be interested persons under Rules 734 and 735. (Emphasis added.)

[11] In the English case of *Re Beesley exp Beesley v Official Receiver* [1975] 1 WLR 568 at pp 570–573:

Goulding J:

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...

...

Section 29 (1) reads as follows:

'Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the court may,' — and now come the critical words — '*on the application of any person interested, by order annul the adjudication*.'

The short point is, therefore, is Mr. Beesley a 'person interested' within section 29? Since no special legal relationship other than that of matrimony is alleged, I formulate it in the more general way, is a husband a 'person interested' for the purpose of applying that his wife's bankruptcy be annulled?

...

It cannot in my view reasonably be suggested that when Parliament, first in the Bankruptcy Act 1883 and then in the Bankruptcy Act 1914 in revising the law, included these same words providing for 'the application of any party interested,' it intended to open the door to persons having an interest based on family sentiment or similar feelings alone. Thus, for my part, I disagree with the suggestion made in very tentative language in the 17th and 18th editions of Williams on Bankruptcy (1958) and (1968) respectively but not, we were told by counsel, in earlier editions, that a 'person interested' might possibly include a relative desiring to clear the family name. However, it does not necessarily follow that a 'person interested' must show a specific interest in the sense of an interest in some particular claim, contract or the like. The more difficult question, as I think it is, is whether the matrimonial status that exists between a husband and a wife is of itself sufficient to give him an interest within the meaning of the section in the status of his wife as a bankrupt or a person not bankrupt.

...

...

Thirdly, we have been referred to a decision of Megarry J. on section 352 of the Companies Act 1948 under the name *In re Roehampton Swimming Pool Ltd* [1968] 1 WLR 1693. Megarry J. in that case, like Upjohn J. in the earlier case, *Stevens v Hutchinson* [1953] Ch. 299, *was disposed to give a rather restricted meaning, compared with my first ideas, to the term 'person interested' in statutory enactments. I think, therefore, that those cases are of some guidance to us (even though the subject matter is a little different), and point the same way as the other considerations I have mentioned.*

...

...

Walton J:

...

...

I think one can see that that cannot be the right solution, because if he is merely interested as a husband and has no other interest, pecuniary or financial, at all, what is supposed to happen if he takes one view and his wife takes another view? Is one to

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have the bankruptcy court as a forum for domestic squabbles along those lines? Quite clearly that cannot be right. Therefore I think one has to come to the conclusion that the husband can only make such an application when he has an interest which is not necessarily the same as that of the wife. Of course, if he has a financial or pecuniary interest in his wife's bankruptcy, as he may very well have, then that will be a sufficient foundation for him having an interest; but otherwise, in my judgment, no.

Therefore, I think that this court ought to follow the decision of In re *Roehampton Swimming Pool Ltd.* [1968] 1 W.L.R. 1693, a very similar point arising under the companies' legislation and not the bankruptcy legislation. Therefore I also would dismiss the appeal on this point.

Once again I should like to emphasise, as Goulding J. has emphasised, that both of us are only saying that mere matrimonial status is not a sufficient foundation for the necessary interest under section 29 (1), leaving open what other relationships between husband and wife might in proper circumstances be a foundation for the necessary interest.

[12] In another English case, *Re Roehampton Swimming Pool Ltd* [1968] 1 WLR 1693 at p 1698, the court, inter alia, held:

In relation to a statute authorizing an application to the court for some relief relating to a trust for sale, the judge is there treating a 'person interested' (and the phrase is used in simpliciter) as meaning a person interested in some proprietary right, and as excluding a person who merely has personal rights. Here I am concerned with a statute authorising an application to the court for some relief relating to a dissolved company; and although it may be a far cry from a trust for sale to a dissolved company, there is enough similarity between the two processes of application to the court for *Stevens v Hutchinson* to give me some guidance.

The word 'interest' is, of course, susceptible to more meanings than one; and like so much of the English language, its meaning has often to be discerned from the context. In relation to making an order for the revival of a defunct company, it seem to be more probable that the words refer to a pecuniary or proprietary interest that that it embraces all matters of curiosity or concern. After all, those who are interested in companies are nearly always interested financially or in a proprietary way; the whole field is dominated by finance. I cannot conceive that Parliament intended that a man who felt a lifelong concern for dissolved companies should be free to gratify his passion by reviving them under section 352, however deep and genuine his feelings, and whether his affections were spread among all such unfortunates, or were concentrated on one favoured corporation; and I do not think that Mr. Instone's argument carried him that far. What he said, when I asked him to define the interest that Mrs. Dymond had, was in essence that she was interested as being the claimant's solicitor; and he did not elaborate on this concept. (Emphasis added.)

[13] The local cases of *Lembaga Lebuhraya Malaysia v Cahaya Baru Development Bhd* [2009] 5 MLJ 14, is pertinent and instructive in the construction of the said s 41 of the 1959 Act where the Court of Appeal

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considered the definition of 'person interested' under the s 2 of the Land Acquisition Act 1960.

[14] In the light of the authorities cited above, this court finds that the phrase 'any person interested' appearing in s 41 of the 1959 Act, is not to be interpreted to mean 'the world at large'. It should be restricted to an individual or group of individuals who have a 'recognised' interest in the estate of the deceased. The 1959 Act clearly refers to a beneficiary, a residual legatee, a creditor or a trustee and this court finds that the plaintiff does not fall into any of these categories. The plaintiff is a stranger for all intents and the purposes of the estate of the deceased as he is not a beneficiary under the will.

[15] As such, since this court finds that the plaintiff is not an 'interested' person as he is not named or provided for in the will, the plaintiff does not possess the necessary locus standi to make this application for the production of the will under s 41 of the 1959 Act. Being an alleged natural or illegitimate son of the deceased, does not mean that the plaintiff falls within the meaning of the 'any person interested' as contemplated by s 41 of the 1959 Act.

[16] Another relevant factor, to take into consideration is that it is an undisputed fact that no application for grant of probate has been made in Malaysia and as such the plaintiff is not entitled to any of the reliefs sought under s 41 of the 1959 Act. Section 41 of the 1959 Act is inoperative until and unless an application for grant of probate has been made, hence this application under s 41 of the 1959 Act is premature.

[17] Section 3 of the Distribution Act 1958 defines a child for the purposes of distribution of a deceased's estate to be as follows:

> 'child' means a legitimate child and where the deceased is permitted by his personal law a plurality of wives includes a child by any of such wives, but does not include an adopted child other than a child adopted under the provisions of the Adoption Act 1952; [Act 257]

[18] In *Isabela Madeline Roy & Ors v Sarimah Low bte Abdullah & Ors* [2005] 2 MLJ 521; [2004] 8 CLJ 302, the court at p 303 held, inter alia, as follows:

> [2] The deceased's marriage to the second defendant, in the circumstances, was null and void and of no effect. It followed that the third and fourth defendants had no right of inheritance from the estate of the deceased, there being no valid marriage between their parents. 'Child' by virtue of the Distribution Act 1958, must mean 'legitimate child'.

[19] In the English case of *Hill and another v Crook* [1874–80] All ER Rep

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62, the court held at p 66 as follows:

> ... There may be a gift to existing illegitimate children as a class, provided it clearly appears that they were intended to be the objects of the gift. No gift, however express, to unborn illegitimate children is allowed by law, nor under a gift, good as to illegitimate children as a class, will as a class, will after-born illegitimate children be permitted to take. But I know of no objection in law to a gift to children with a clear intention that it shall apply to existing illegitimate children being so applied, although, after-born illegitimate children must be excluded and the gift be extended to future legitimate children.

[20] From the evidence adduced, the plaintiff has not proven that he is the 'legitimate' child of the deceased, so as to entitle him to any assets under the Distribution Act 1958.

[21] The plaintiff produced two birth certificates, one declaring him to be a citizen of Singapore and the other declared him to be a citizen of Malaysia born in the state of Sabah. The plaintiff's Singaporean birth certificate indicated that the father of the plaintiff is the deceased and the mother is one Lum Sook Chun whereas the plaintiff's Malaysian birth certificate stated the father of the plaintiff as Liew Gek Poh and not the deceased whilst the mother of the plaintiff is named as Lam Sock Chan and not Lum Sook Chun as stated in the Singaporean Birth Certificate. The plaintiff contends that the differing names were due to the difference in the Chinese dialects used in Singapore and in Sabah.

[22] Both of the plaintiff's birth certificates also state that the plaintiff was born on different dates. The Singaporean birth certificate states the plaintiff was born on 4 December 1973 whereas the Malaysian birth certificate states the plaintiff's date of birth is 3 December 1973.

[23] In *Re Estate of Teo Quee Kee (deceased)* [1997] 3 SLR 1030, the court held at pp 1036–1037 as follows:

> 28. As for Mr Ng's other submissions, I could not accept these. My reasons are:
>
> > (a) The applicant's birth certificate showed no flaw in his relationship to the deceased, unlike the birth certificate produced by the caveator. No evidence was adduced by the caveator to explain what he alleged were spelling errors of the names of his parents in his birth certificate, the difference in the stated occupation of his father to that of the applicant's father and the mother's residential address ...
>
> 29. As the evidence showed the applicant to be the natural son of the deceased, it was crucial to the caveator's case since the caveator's birth certificate, in view of the discrepancies, did not satisfactorily show him to be a natural born son of the

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deceased, that he show, on a balance of probabilities, that he was the applicant's sibling. In view of Dr. Chuah's evidence which I accept and the other evidence to which I earlier referred, he did not.

[24] Further in *Chia Kay Heng & Anor v Chia Kim Siah & Anor* [1990] SLR 117, the Court of Appeal held that a certified true copy of a death certificate was acceptable evidence of death, thus the discrepancies in the certificates, could not be corrected as the contents are prima facie proof of the accuracy of the fact stated therein.

[25] This court also finds that the plaintiff has failed to prove that there was a valid marriage between the deceased and the plaintiff's mother, which lend support to the defendant's contention that the plaintiff is not a 'legitimate' child of the deceased.

[26] This court is in agreement with the contention of the defendant that even if the plaintiff was successful in obtaining production of the will, challenging and setting aside the will, such acts would be of no benefit to the plaintiff as the plaintiff has not even proven that he is not a 'legitimate' child of the deceased so as to entitle him to any assets under the Distribution Act 1958. Thus the plaintiff's application for the production of the will herein an exercise in futility.

ORDER

[27] In the light of the above, this court dismisses this originating summons with costs.

Application dismissed with costs.

Reported by Kanesh sundrum